No. 11,766

United States Circuit Court of Appeals

For the Ninth Circuit

BURNHAM CHEMICAL COMPANY,
Appellant,

vs.

BORAX CONSOLIDATED, LTD., ET AL.,
Appellees.

Memorandum of Appellant in Answer to the Reply of Borax Consolidated to the Supplementary Memorandum in Behalf of Appellant

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INTRODUCTION

The Reply of Borax Consolidated, Ltd., et al. to our Supplementary Memorandum is beset with frailties. A vital weakness is that it lacks a frame of reference. It fails to relate the immediate issue with which it is concerned to the cause of action pending in the court below. It is scarcely less vital that it deals with law and equity as if they were separate things, that its citation of cases is governed by no rule of relevancy but wanders far from

antitrust, that the text of the Reply is largely a thing of shreds and patches made up of quotations in abstract language torn from their contexts and, in general, the argument is a mosaic of legalisms. It is an axiom that a holding must be read in the light of the concrete situation before the court. It is necessary, therefore, to recapture perspective and to view the detail of issues concerned with the application of a state statute of limitations within the setting of the specific case which is now in litigation.

ARGUMENT

I. THE ISSUES HERE ON APPEAL CAN BE UNDERSTOOD ONLY AGAINST THE BACKGROUND OF THE INSTANT CASE.

This is a suit by Burnham Chemical Company against several large corporations engaged in the borax business. The three principal defendants, Borax Consolidated, Ltd., and its subsidiary, the Pacific Coast Borax Company, and American Potash and Chemical Corporation, dominate the industry. The appellant alleges and is now prepared to prove that these companies have from the first date mentioned in the complaint been acting in concert, that a series of understandings was formalized into a basic agreement in 1929, that through this treaty these companies and their subsidiaries organized a cartel which has worldwide dominion over the production, transportation and marketing of borax and that over the years these companies acting in concert have consistently employed unfair and predatory practices to drive independents, including appellant Burnham, out of business.

The appellant, along with other independents, has been driven out of business. Being forced to the wall in 1929,

the record shows that it was skeptical of the genuineness of the competition between Borax Consolidated, Ltd., and American Potash and Chemical Corporation, which these companies professed, and that at times it came to believe that these two larger confederates, along with the Pacific Coast Borax Company and the United States Borax Company, had by a concerted and illegal course of conduct—alleged in detail in the complaint—forced the appellant out of business. But even though the Burnham Chemical Company at times may have believed that the professions of appellees were false and that their conspiracy was the source of its undoing, it was unable to secure evidence enough to frame a complaint which would stick in court.[1] A reading of this sentence in the margin is enough to indicate that Burnham was not and for many years could not be in possession of the facts essential to frame a complaint. It is true that once in court the procedures of interrogatory and discovery would be available. But the complaint had to survive a motion to dismiss before these weapons could be brought within Burnham's reach.

But Burnham did not sleep on his rights. It pursued its own investigations with diligence as far as its means would permit. When it became evident that the task was

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(1) The minimum requisites for a complaint have been succinctly stated by Judge Parker in *Alexander Milburn Co. v. Union Carbide & Carbon Corp.*, 15 F.(2d) 678, 680 (cert. den. 273 U.S. 757). The Court said:

> "For it is not sufficient that the declaration be framed in the words of the statute or that it allege mere conclusions of the pleader. It must describe with definiteness and certainty the combination or conspiracy relied upon, as well as the acts done which result in damage to plaintiff and in doing so must set forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy, or the facts constituting the attempt to monopolize."

beyond its own resources it complained to the Department of Justice. But the conspiracy had been concealed with such skill and cunning that even the Department of Justice with all of its resources could not discover evidence sufficient to warrant an action at law. It was not until 1944 when the seizure of American Potash as an alien corporation gave the Government access to the files of the company, that the master agreement of 1929 was discovered. And with the series of clues presented there, the whole conspiracy was revealed. After the discovery of the facts of conspiracy and the plan of restraint, Burnham proceeded with diligence to frame and to file its cause of action.

In the record four things stand out sharply:

(1) Burnham was not guilty of laches and did not sleep on its rights;

(2) The whole scheme of deceit was fraudulently concealed for years;

(3) No amount of diligence on Burnham's part could have turned up the minimum of evidence necessary to sustain a cause of action, and

(4) Once the materials were put within reach, Burnham promptly filed its complaint in court.

Against this background, the procedures of the court below are to be reviewed and the issues in this proceeding are to be adjudged.

II. THE REPLY OF BORAX CONSOLIDATED, ET AL., IS BASED UPON PREMISES UTTERLY FOREIGN TO OUR SYSTEM OF LAW.

1. The Reply is written as if each issue in the case was to be resolved by reference to a fixed and invariable rule of law. A case—particularly an antitrust case—is a com-

plicated statement of fact. The course of conduct subject to legal challenge is engaged in by many actors, sometimes over a period of years. The lawfulness of the conduct is to be measured not by a single rule of law but by reference to all the law that is applicable. In a Sherman Act case there is always involved reference to the antitrust laws, to the general law within which antitrust is set and to various state statutes. A rule of law may be compelling. Another may be useful as a guide. A third may throw light upon an issue. But the case must be decided in terms of all the law that is relevant.

2. The Reply eliminates from a case the function of judgment. It is written as if the application of the law to a controversy were mechanical. Rules are regarded as static things. Yet the genius of our law is its flexible character. This flexibility appears in the usage of trial by jury in leaving the issue to the reasonable man. It is written in large letters in the antitrust laws which from the days of *Standard Oil v. U. S.,* 221 U.S. 1, *to F.T.C. v. Cement Institute,* 68 S.Ct. 1335, have upheld the rule of reason. It is the very character of administrative law to have general provisions shaped to the circumstance of particular situations. In respect to our insular territories the laws of the United States are to be applied so far as they can be adapted to territorial need. The Constitution itself is written in terms which will take concrete meaning from changing circumstances.

3. The Reply degrades a private suit in antitrust to the status of a mere private controversy which concerns only the parties.

4. Under the antitrust laws the function of the private suit is alike to redress a private harm and to vindicate

the public interest. Although this matter has been set forth in some detail in our Supplementary Memorandum, it has been confused in the Reply. It is, therefore, necessary without repeating what has been said before, to straighten out the confusion. The appellees are quite wrong in insisting an antitrust suit is to be treated like any other private action.

Among the oldest and the best established of our rights is the liberty of a man to and within his trade. This liberty was recognized as a fundamental right as long ago as 1616. *Case of the Tailors of Ipswitch,* 77 Eng. Rep. 1218. The courts even refused to accept a royal grant of monopoly as a sanction for closing a trade against the newcomer. *Darcy v. Allen,* 77 Eng. Rep. 1260. The right has been recognized even against the act of the legislature in our own system of law. *Yick Wo v. Hopkins,* 65 S. Ct. 1064; *New State Ice Co. v. Liebmann,*

It is for these reasons that Mr. Chief Justice Hughes in *Appalachian Coals, Inc. v. U. S.,* 288 U.S. 344, 359, set it down that: "As a charter of freedom the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." The comparison is more than an analogue. It is a summary of interpretative judgments by the Supreme Court. As Mr. Justice Sutherland put it for the Supreme Court in *Puerto Rico v. Shell Oil Co.,* 302 U.S. 253, "The Congress meant to deal comprehensively with the subject of contracts, combinations and conspiracies in restraint of trade and to that end to exert all the power it possessed."

The idea that the public interest is to be protected through private litigation is in no sense novel. It is basic to our system of jurisprudence. In England it goes back

for centuries. In this country it is present from the foundation of the Republic. *Marvin v. Trout,* 26 S. Ct. 31, 34. It stems from the informer who in days of old was accorded his cause of action and allowed a substantial share of all the revenue he could collect for the government. With a change in usage, the informer now usually gives his information to an official of the government rather than suing in his own name. The usage, however, has survived in a derivative form. A person who has a cause of action of his own is made an instrument of police. Thus, in tort the usage of exemplary and punitive damage is established. The plaintiff in his own right is entitled to be made whole. The double or triple penalty is assessed to punish the wrongdoer and to prevent future offenses.

The Sherman Act as passed by the Fiftieth Congress is not a new statute. It was deliberately written in the language of the common law action against restraint of trade. The fact that the injured party if he makes out his case is entitled to recover three times the amount of his damage is in accord alike with the common law against restraints. The triple damage action goes back at least as far as the Statute of Monopolies, 21 Jac. 1, Ch. 3 (1623, 1624). It is of note that the private action can be brought for a violation of any section of the antitrust laws. The substantive law involved in the private action is the substantive law which is invoked when the government institutes a criminal suit or resorts to an equity proceeding. The private action, far older than the Sherman Act, is the original instrument depended upon to police the common law against restraints. The novelty of the act does not lie in the triple damage suit. It lies in the sanction for a criminal action and in the formalization of resort to

equity. The private suit is allowed to prevent violation of the very loss for which there is resort to criminal or equitable action.

As the authorities quoted in our Supplemental Memorandum show, the very purpose of the triple damage provision is to supplement in every way the activities of the government in the enforcement of the antitrust laws. The theory of the triple damage action is that the defendant should suffer a penalty because he has committed a crime. The act was written in the full knowledge of the fact that the government would not be able to reach a large number of violations of the statutes and that, therefore, each injured party was made and constituted a kind of private policeman. The triple damage feature of the Act has nothing to do with compensating the wronged party for the injuries suffered. It is in effect an interim proceeding to deter other people from violating the Act and in this respect it has precisely the same purpose as a criminal penalty. A dominant purpose alike of the old common law rule against restraints and of the modern antitrust acts is to lighten the burden upon the government in enforcing the antitrust laws and of enlisting private parties in the business of law enforcement. This is indicated by Section 5 of the Clayton Act which relates private rights to public litigation. This section aims at three distinct purposes: (1) It suspends the running of any statute of limitations while the government is pushing forward litigation concerned with the same matter; (2) it makes the findings of fact in suits brought by the government *prima facie* evidence in private suits, and (3) it imposes upon governmental agencies the function of conducting inquiries necessary to reveal the facts upon

which private antitrust suits can be based. The last function is of particular consequence because the discovery of evidence necessary to win a suit or even to write a complaint is as often as not beyond the resources of the private party.

The law of recourse to the courts is quite plain. It is true, as appellees claim, that a party cannot file suit in an antitrust case unless he himself is injured. But none of the authorities cited in the Reply Brief is to the effect that his suit once it is in court must be so limited. As here, the harm to the individual is in the usual case a mere incident to the unfolding of the conspiracy. The conspiracy as an entity cannot be understood from the vantage point of the private interest which is wronged. As Mr. Justice Black pointed out in the *Cement* case, an understanding of the wrong involves the picture and the background of the whole conspiracy. Nor is it true that the relief sought by the private party is limited to recompense for the wrong. In the private damage suit it is of note that he collects not a sum sufficient to make him whole but three times that amount. In the case in equity the private harm may be so inseparably associated with the wrong to the public that relief to the private party involves a general relief of which the public is the beneficiary.

The use of a private suit to instrument public policy finds a natural field in antitrust. It is of note that of late this old and established device has been pushed into a new legal domain. Administrative law is in general statutory law and as a consequence the right of the individual to his cause of action—when the end is to give effect to a public policy—rests upon legislation. So, in general, per-

sons authorized to bring such suits—and only such persons—are permitted this resort to court to assert the public interest. And it is natural that the interest is set up as the criterion of the right to sue. In a penetrating opinion in which the whole matter is passed in critical review, Judge Jerome Frank generalizes the requirements of a number of statutes into "some substantive, private, legally-protected interest." *Associated Industries v. Ickes,* 134 F. (2d) 694. But the real question is whether the requisite interest is "substantive" or "legally-protected," not in general but for the express purpose of instituting such a suit. In this excursion into administrative law it has been easy for the courts to pass from direct to secondary or derivative interests. The derivative suit by which the stockholder sues in the name of and as if he were the corporation stems from ancient lineage. In recent years a dual form of action in which the party plaintiff has some interest, however remote or nebulous to assert, and yet the real justification for the action is an opportunity to assert the public interest, has become quite prevalent. Thus a legally recognized injury, as well as an actual personal harm, is enough to sustain a cause of action. *Alabama Power Co. v. Ickes,* 302 U.S. 464. And in *F.C.C. v. Sanders Radio Corp.,* 60 S.Ct. 653, it was admitted that Sanders enjoyed no legal immunity from competition. Yet it was held that the issue presented by the grant of a license to a competitor made him an aggrieved party in the words of the statute. Although the right recognized was not sufficient to warrant his suit for an injunction, the public interest in the grant of the radio license made up the deficit—at least to the point where a judicial inquiry could be touched off and in *Scripps-How-*

ard Radio, Inc. v. F.C.C., 62 S.Ct. 875, the somewhat vagrant lines of the case just mentioned are drawn tight. Courts no less than administrative bodies are "agencies of government." The right of appeal from the decision of the agency to persons aggrieved is not to be limited to the severities of substantive law. "These private litigants have standing only as representatives of the public interest." And, quoting from *Virginian Ry. v. System Federation No. 40,* 300 U.S. 515, "the court can go much further in the public interest than when only private interests are involved." Thus the theory that private suits are to be used to police public policy not only goes back to the beginnings of our system of law, but currently finds expression in widely scattered fields in which the public interest is involved.

The bother about the argument in the Reply Brief is that it puts the question in the wrong way. There is no question of whether private rights are enlarged by the plea of the public interest or whether the private defenses are thereby restricted. Here, as in other branches of the law, the rights of the plaintiff and the pleas of the defendants are fixed by the character of the action. Here the very purpose of the suit is to police a public policy. The antitrust laws would lose their effect if in their administration judicial procedure had to stop short of the function to be performed.

III. THE ANTITRUST ACTS ARE DECLARATORY OF PUBLIC POLICY AND IN THEIR JUDICIAL ADMINISTRATION THE SUBSTANTIVE RIGHTS WHICH THEY CONFER ARE NOT TO BE DEFEATED BY THE REGID APPLICATION OF STATUTES AND PROCEDURES INTENDED TO INSTRUMENT THEM.

A disposition of the issue before the court is dependent upon a clear-cut understanding of the place of the statute of limitation in the administration of the antitrust laws. The Sherman Act announces our dominant public policy for the national economy. It confers upon individuals the liberties of their trades and guarantees their right to the free and open market. It insures to the public the protections of a competitive system in action. The rights which it establishes are among the liberties guarded against the government itself. They are guaranteed by federal law. In the judicial administration of the antitrust acts a great many devices and procedures must be employed. These devices and procedures are of an instrumental character. They are intended as aids to help towards the realization of the objectives of the antitrust acts. They are not intended to be barriers against the realization by individuals of rights guaranteed to them by federal law. The Sherman Act itself sets down no statute of limitations. It does not even say that the state statutes are to be employed. In the silence of Congress "the limitations of time for commencing actions under national legislation" has been left to judicial implication. As to actions of law, the silence of Congress has been interpreted to mean that it is a federal policy to use at least as a guiding principle the local law of limitations.

The current trend of judicial decision runs strongly against allowing the policies manifest in federal statutes

to be defeated by a rigid application of state rules invoked to instrument judicial administration.

The federal courts of late have been increasingly aware that federal statutes are expressions of public policy; that it is only in the light of its intent and objectives that an Act of Congress can be understood, and its declared policy is to be the guide to its judicial administration. This trend is manifest in decisions concerned with a wide variety of procedural devices, which are employed in reaching judgments on substantive issues.

See *Holmberg v. Ambrecht,* 66 S.Ct. 582, 584. Thus it is implied that state statutes of limitations are to be absorbed "within the interstices of the federal enactments." It is thus only by implication that state statutes of limitations are brought in. It is of note that in the generality of antitrust cases no mention is made of a statute of limitation.

There is in federal law no command that the courts shall follow state statutes on limitations. Federal rights are of a most diverse character, running all the way from claims under a contract to suits for being put out of business by a conspiracy. They run the whole gauntlet of causes of action under the law and are most diverse in kind. Some states lump all of these together and set against them a single period of time within which a suit must be begun. Others allow cases seeking to vindicate federal rights to be established as best they can upon state statutes. For this purpose the state statutes are far from ideal instruments of judicial administration. In most states—California is in point—there is no special provision for antitrust actions. The usual state act resolves causes of action into a number of categories and sets a time period against

each of these. The categories have been framed by state legislatures with state and local laws primarily in mind. Almost none of them contain a category into which a private action for antitrust can easily fall. In most of them an antitrust suit will fall as neatly or as clumsily into one category as well as into another. It is quite proper to insist that the state law may furnish guidance to the court in determining antitrust issues. It is unwarranted to say that acts never intended to serve such a purpose must be rigidly followed. The substantive provisions of the antitrust law have long been governed by the rule of reason. It is absurd to say that this rule of reason must be abandoned on the administrative level.

It is of note that these statutes are so diverse in character as seriously to affect the federal rights which they are intended to secure. The periods within which suits must be brought vary greatly from state to state. They may also vary within the same state according to the category in which an antitrust action is put by the court. A number of men may have exactly the same rights under the substantive law of antitrust. These rights, however, may mean quite different things as they are affected by the different statutes of limitations of the several states. The case of *Momand v. Universal Film Exchange,* 43 Fed. Supp. 996, is here in point. The plaintiff in that case, a citizen of West Virginia, brought his suit in Massachusetts. The Massachusetts law decrees the period fixed by the statute of limitation of the state in which the plaintiff has his domicile. In this case the plaintiff not only had a shorter period in which to bring his suit but what that period was depended upon a number of provisions in the West Virginia statutes. Judge Wyzanski with meticulous

care tried to determine exactly which statute of limitation was correct. He undoubtedly did justice in the instant case, but the result is the greatest diversity in respect to the rights of citizens depending upon their places of residence and the state in which they bring suit. Such a diversity is a denial of equal justice before the law and was never intended by the antitrust acts.

The statute of limitation must be appraised in terms of its instrumental purpose. It is intended to insure fairness to the defendant by seeing to it that any complaint against him is brought within a reasonable time. It is intended to insure justice by securing a trial while memories are fresh, while facts are in hand and while documents are available. The statute of limitation is intended to prevent the plaintiff from sleeping on his rights and to insure that his cause of action is brought while it is timely. A literal application of the statute for which the appellees contend would deny and defeat the very purpose of the statute of limitation. If the action had to be started within three years after the last overt act, it might have to be brought into court before plaintiffs had acquired knowledge of the conspiracy. Before the pattern of restraint could have been discovered and before any of the pertinent documents were available. In that case it would have insured a trial at a time when the plaintiff had no opportunity to make out his case. As set forth in detail in the complaint, the appellees held themselves out to be engaged in a competitive game. As the complaint alleges, the game was crooked and the cards were stacked. This would amount to a travesty upon the law. In view of all this, there are three quite distinct ways in which the court may look at the matter. It is of interest that all

three lead to the same result: (1) the court may hold that since the federal law is an expression of public policy the objectives of antitrust must be realized. To that end the statutes of limitations must be recognized as instrumental. They can, therefore, be used for guidance, but must not be allowed to subvert the ends of justice; (2) the court can hold that the defendants have in the series of frauds recited in the complaint and in the fraudulent concealment of those frauds been guilty of unethical conduct. It is to be remembered that the statute of limitation is technically a plea to be put forward by the defense. To be properly put forward not only must the statute be plead but a case must be made out for its application. In other words, it must be shown that it protects the defendants against negligence on the part of the plaintiff and against an untimely assertion of charges. In the instant case the statute of limitation will not stand critical examination in terms of the defense for which it is intended. In more extreme form, it can be argued that because of their unethical conduct and their inability to come into court with clean hands, the plaintiffs are estopped from such a plea; (3) the court may rule that it is proper in this case to apply the appropriate California statute and that the appropriate statute is that which states that when there is fraud and fraudulent concealment the time shall begin to run from the date of discovery.

Any one of these three alternatives will lead to the same result.

IV. FRAUD IS HERE PRESENT.

Appellees seek an escape from having to answer by insisting that the course of their conduct as recited by the Complaint does not constitute fraud and that in respect to it there has been no fraudulent concealment. They argue that for the more liberal section of the statute of limitation to apply the fraud must be "the gravamen of the offense" and that the law holds that an antitrust suit for triple damage is not bottomed in fraud. In support of this contention they rely upon the single case of *Foster and Kleiser v. Special Site Sign Co.,* 85 F. (2d) 742. The case gives no support to that contention. In the court below there had been a complete trial; and, on the basis of the record, the court on review stated that it had failed to discover evidence of fraud.

The contention runs directly contrary to the facts. The suit for triple damage is a suit for a wrong. In the instant case—as with its kind—the wrong is done to a man's business. Unlike the ordinary wrong it may not involve personal malice; the intent is to seek a competitive advantage for one's self or to impose a disadvantage on a competitor. The animus which prompts the wrong has been referred to by Mr. Justice Holmes as "disinterested malevolence." A person—whether natural or corporate—may be injured in his business by any one of a number of wrongs. A conspiracy is an instrument, neither good nor bad in itself; its legal quality depends upon its intent and the use to which it is put. There can be a conspiracy to feed the hungry, to corrupt youth, to blackmail the rich and innocent, to save souls. In antitrust the conspiracy is usually directed, by the commission of a wrong or a series of wrongs, to restrain trade or to secure a monopoly. The

gravamen of the offense lies not alone in the conspiracy, but also in the wrong, as the defendants have admitted. Note their insistence upon each injury as occasion for a separate cause of action. And the business harm can take any one of a number of forms. The instances of pure negligence are rare. Slander and libel are at common law "unfair trade practices" and have come under the condemnation of Section 5 of the Federal Trade Commission Act. A conspiracy in restraint of trade is not infrequently a trespass on the other fellow's business. Once an overt and avowed attempt to put a competitor out of business—as in the old fashioned tactics recited in the *Foster and Kleiser case*—was the dominant form of business wrong. Fraud is a common form; with the better enforcement of the antitrust laws, it has come into the ascendancy as the dominant form of business wrong.

It seems unnecessary to burden this memorandum with so elementary a discussion. Its application to the instant case is self-evident. The right of a man to, and within, his trade is a fundamental liberty. The Sherman Act makes it the law of the land that there shall be no ganging up by members of an industry against one of their kind. The Clayton and the Federal Trade Commission acts decree a plane of fair competition and forbid unfair competitive practices. The defendants have ganged up against Burnham and other independents. They have entered into an elaborate scheme, by the use of unfair, deceptive, fraudulent practices to drive Burnham to the wall. All the time they have represented themselves as conducting their business in a fair and lawful way. From long before 1929, when a series of understandings was formalized until 1944, they have succeeded in concealing their

fraudulent scheme from their competitors, the general public and the government. Under the statutes prohibiting the use of the mails to defraud, there have been hundreds of convictions for fraud. The offenses revealed there are petty compared with the gigantic design of Borax Consolidated and American Potash to defraud small companies not only of their business but of the very opportunity to engage in business. The defendants made out of the marketing of borax a crooked game while holding themselves out to be honest business concerns operating according to law. The offense charged in the Complaint belongs at the very top of the hierarchy of frauds.

V. THE CASES RELIED UPON BY APPELLEES ARE NOT IN POINT.

A word in respect to the cases cited by the Appellees is in order. It is perhaps enough to say that this code of usage in respect to citation is distinctive. It has no place for a recitation of the facts of the case, for an exact statement of the issue before the court, for the concrete situation to which the holding applies, or for the limits which the court imposes on its own language. Instead cases are cited which only in the vaguest way or not at all concern antitrust; dicta in abstract language are wrenched from context; and fragments, woven together into mosaics, are driven as inert declarations towards appointed goals. A number of examples are given elsewhere in this memorandum. It is necessary to bother the court with only a few representative samples to exhibit the character of the whole performance.

1. The case of *Mercoid Corporation v. Midcontinent Investment Co.*, 320 U.S. 661, is cited on pp. 2 and 15 of

the Reply. On p. 2 it is employed to pick up the cited case of *Fleitmann v. Welsbach Street Lighting Co.,* 240 U.S. 27, in which Mr. Justice Holmes rules that a private anti-trust suit is an action at law. That proposition is neither doubted nor is it in issue in this case. Note that the ruling is not from the *Mercoid case.* On pp. 15-16, the *Mercoid case* is cited for the fact that Mercoid was allowed to bring its counter-claim for triple damage. The statement that the counter-claim was disposed of "under settled rules applicable to private litigation" just isn't so.

2. In the Reply a long passage is recited from *Campbell v. Haverhill,* 155 U.S. 610, to the effect that neither the privileges of the plaintiff should be enlarged nor the pleas of the defendants restricted. Even the passage itself makes it clear that the ruling is limited to a patent infringement suit. In such a case—the reverse of the anti-trust suit—the plaintiff is asserting a privilege and public interest lies on the side of the defendant. For, if the validity of the patent is upheld, an exclusive right to make use and vend will be vested in the plaintiff, while if it is declared invalid the so-called invention will pass into the public domain.

3. In *Hazel Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 338, the court's decision is in the Reply, p. 16, superseded by a short gloss upon a single passage in that decision. That gloss is a line in *Briggs v. Pennsylvania Ry. Co.,* 333 U.S. 92, to the effect that "power to act on the mandate after the term expires survives to protect the integrity of the court's own process." True, but the fraud against the court was secondary and derivative, and the opinion of the court in the *Hazel Atlas case* makes it clear that it was acting to guard the public interest.

4. The case of *Foster & Kleiser Co. v. Special Site Sign Co.,* 85 F. (2d) 742 comes nowhere near supporting the propostion for which it is cited. As set down elsewhere, the decision holds that the record discloses no fraud on the part of the defendant. It is cited to hold that an antitrust action does not sound in tort.

5. In *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390, suit was brought because of the excessive price of iron products by reason of a gang-up among the sellers. A federal statute of limitation of five years, concerned with penalties and forfeitures, was rejected. A Tennessee statute of 1 year was rejected in favor of a 10 year statute. The court, through Mr. Justice Holmes, chose among alternative states and allowed to the plaintiff that most favorable to its cause. None of this is stated in the citation.

6. The case of *Glenn Coal Co. v. Dickenson Fuel Co.,* 72 F. (2d) 885, is correctly cited for the propositions that "to receive the plaintiff" in a triple damage action must establish both a violation of the law and his own damage. But this is no authority for saying that in such an action he does not represent the public, that he is limited to so much of the conspiracy as results in his own injury, or that the court is limited in its relief to recompensing him for his own damage. The case correctly supports elementary laws; it gives no support to the attempt to rebut the propositions in our Supplemental Memorandum.

7. The reply, p. 11, attempts to answer our citation of *Mid-West Theatres Co. v. Co-Operative Theatres,* 43 F. Supp. 216, to the effect that "where, in a private controversy there are questions which may seriously affect public interest, the ordinary rules of evidence need not

always be followed," by a passage from the same case that for a cause of action the "plaintiff cannot rely upon a showing of wrongs to others." Granted; he can get into court only by alleging his own injury. The triple damage action is for a party which has an interest of its own, not for the busy-body. The question is what he can do when once he is in court.

The examples just discussed give a representative, but far from complete exhibition of the distinctive usage of the Appellees in the citation of cases. It would be as tiresome, as it is unnecessary, to continue the catalogue.

Reply of Appellant Relative to the Absence of a Formal Verdict

On the 30th day of July, 1948, appellant received the reply of appellees to the Supplemental Memorandum of Appellant. Coupled with this reply was a "Memorandum Relative to the Absence of a Formal Verdict," and having to do with the order of this Court directing the Clerk of the District Court to transmit a supplemental record containing the verdict or certifying that there was none.

Pursuant to such Order the Clerk of the District Court under date of July 23, 1948 filed with this Court a "Supplemental Record on Appeal," in which it was certified that "no verdict was filed in the above entitled case." Subsequently thereto, and on August 5, 1948 and without the order of this Court, the Clerk of the District Court filed herein a document entitled, "Supplemental Record on Appeal," in which it was stated:

> "I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, in pursuance of the order of the United States Cir-

cuit Court of Appeals for the Ninth Circuit filed on July 21, 1948, do hereby certify that no written verdict was filed in the above entitled case.

"I further certify that the following minute order was entered in the above entitled case on April 3, 1947:

'The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was resumed. The Court having taken under advisement the respective motions of the plaintiff and the defendants for a directed verdict in favor of the plaintiff and the defendants, respectively, and due consideration having been had thereon, it is Ordered that plaintiff's motion for a directed verdict be denied and the defendants' Motion for a directed verdict be granted. It is further Ordered as to the special issue to be submitted to the jury, to-wit: "At any time from May 17, 1929 to October 10, 1939 did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust laws of the United States?", that a directed verdict of "Yes" be recorded, and the jury was thereupon excused from further deliberations herein. Mr. Harrison thereupon renewed his motion to dismiss the cause herein on behalf of the defendants, and submitted Defendants' Special Exhibits A and B in support of said motion. After hearing Mr. Carr and Mr. Harrison, it is ordered that plaintiff have fifteen days to file an additional memorandum in connection with said motion, and that defendants have fifteen days to reply. The case was thereupon continued to May 5, 1947, for submission of the motion to dismiss.'

"In Witness Whereof I have hereunto affixed my hand and the seal of said District Court this 5th day of August, A.D. 1948.

C. W. CALBREATH, Clerk,
By C. M. TAYLOR,
Deputy Clerk."

No reference to any such Minute Order was made in the first Supplemental Record on Appeal. An examination of the Record, on page 196, shows therein an order denying plaintiff's motion for a directed verdict and order granting defendant's motion for a directed verdict. This is denominated the Minute Order of April 3, 1947, but such Record does not include all of the Minute Order set forth in the second "Supplemental Record on Appeal" and filed herein. It will be noted that the printed Record, at page 196, only includes the first two sentences of the Minute Order as set forth in the Supplemental Record filed herein on August 5, 1948.

What actually happened is shown by the Record itself as hereinafter set forth.

On pages 18 and 19 of Memorandum, counsel presume to set forth what they designate as "the pertinent facts." Some of these are correct and others far afield. The following is what really happened:

When the motions for a directed verdict were made at the conclusions of the trial, the Court engaged in a colloquy with counsel, which is reported on pages 800 to 819 (T. R.). Upon the granting of appellees' motion, the following occurred (805 R.):

"Ladies and gentlemen, *the decision which the court has just made will excuse the jury from any further consideration of the case.* It sometimes happens that

even though a jury has sat for a long time in hearing evidence in a case, as in this unusual case, it becomes necessary as a matter of law for the court to make a decision which takes the case from the hands of the jury. Therefore, because of the fact that the court has directed the decision in this matter, *it will not be necessary for the jury to make any decision in the case.* I wish to thank the members of this jury for their attention and attendance upon the trial of this case, and to assure the jury, *even though you have not been called upon to make a decision in the case* you have nevertheless by your attendance in the case made your proper contribution as to this case. *The jury may be excused at this time.* (Underscoring ours.)

"Mr. Carr: At this time may the plaintiff except to the denial of its motion? Your Honor has ordered a denial of its motion for a directed verdict. I also except to the order of Your Honor granting the motion of the defendants for a directed verdict.

"The Court: Very well. The record will so show.

"Mr. Harrison: I assume, Your Honor, no formal verdict is necessary?

"The Court: I do not think so. The jury may be excused.

(Thereupon the jury were excused and retired from the courtroom.)

"The Court: Inasmuch as the court has directed the verdict in this matter, Mr. Carr, I would like to ask you whether or not, before the court passes upon the motion to dismiss on the ground that the action is barred by the statute of limitations, if you wish to have an opportunity to present any other ground in opposition to the granting of the motion.

"Mr. Carr: I do, Your Honor, upon the ground of a continuing conspiracy."

From the above quotation of the Record it is manifest that the motion for a directed verdict was granted and *the jury discharged* prior to the entry of any such Minute Order as appears in the second Supplemental Record on Appeal filed herein on August 5, 1948, and that the verdict purported to have been entered was that of the Court and not of the jury. The Record definitely shows that no verdict was ever rendered by the jury.

Following the above statement counsel for appellant stated that he wished to present the question of a continuing conspiracy which was an entirely different point to that presented on the motion for a directed verdict. It was possible that the jury could find that appellant had discovered the existence of the conspiracy and yet such conspiracy be a continuing conspiracy on which the statute did not begin to run until the performance of the last overt act. Finally, the Court granted permission to counsel for appellant to present this particular point in a separate memorandum. This question was briefed and subsequently, and on May 5, 1947, the Court made an order granting the motions to dismiss. Such order is as follows (R. p. 199):

> "ORDER GRANTING MOTIONS TO DISMISS"
>
> "For the reasons stated by the Court in directing a verdict upon the factual issues upon which the defense of the Statute of Limitations was based, defendants' motions to dismiss are severally granted and the cause is dismissed with costs to defendants.
>
> "Dated: May 5, 1947.
>
> LOUIS E. GOODMAN,
> United States District Court.
>
> [Endorsed]: Filed May 6, 1947."

Subsequently, and on May 9, 1947, the judgment in question was signed and filed (R. 199).

The factual question presented to the jury and the question of the continuing conspiracy were two separate and distinct questions.

Counsel state (Memo pages 19, 25 and 27) that appellant made no objections to the absence of a formal verdict, and go still further to say that the judgment and its recital *were approved as to form* as provided in local Rule 5(d), attempting thereby to lead the Court to the belief that counsel for appellant approved the substance of the judgment. Such is not the law or the fact, and of this counsel are well aware, and is but another illustration of their attempt to lead the Court astray. Local Rule 5(d) provides: "Such indorsement (as to form) shall not affect the rights of any party, but shall be considered only as an indication to the Judge that the *form* is correct." No approval of the substance of the judgment or of the judgment itself was made. It was not necessary for appellant to except to the statement of the Court that it did not think it was necessary to secure a formal verdict. In fact, *there was no verdict,* and what the Court actually did was to take the case from the Jury, after granting appellee's motion, and then decide and dismiss the case. (Counsel for appellant had excepted to the granting of the motion for a directed verdict (R. p. 806).) **There was neither a verdict of the Jury nor a finding of fact or conclusion of law, and without the support of one or the other the judgment cannot stand (Rule 52-a). Inasmuch as the Court took the case from the Jury, it was the duty of the Court to make findings of fact and conclusions of law. This is**

not the ordinary case of where the Court instructs the Jury and the Jury returns a verdict in accordance with such instructions; here, the Court took the case from the Jury and decided it exactly as though no Jury had ever been called. Such action on the part of the Court required findings of fact and conclusions of law (Rule 52-a). The failure to do so leaves the judgment without support.

On page 19 of the Memorandum counsel also state that in the statement of points relied upon by appellant no objection was made of the failure to have a verdict returned.

On November 18, 1947 appellant filed its statement of points in this Court (R. 820-821). In such statement it adopted the statement previously filed by it in the District Court and dated August 2, 1947. Turning to such statement (R. pp. 216-19), we find the following:

> "1. The District Court erred in granting upon May 6, 1947, defendants and appellees' motion to dismiss the above-entitled cause."

We submit that such point was sufficient to raise the question here involved as to the lack of verdict. Point 2 in the same statement refers to the error in rendering judgment in this case, and Point 6 alleges that the Court erred in denying upon April 21, 1947, plaintiff and appellant's motions for a directed verdict and for a new trial on the question of the statute of limitations. Likewise, the following from the Notice of Appeal (R. p. 215) designates the orders appealed from, viz.:

> "(a) The order made and entered in the above-entitled action on the 6th day of May, 1947, granting the motion of defendants and appellees herein to dismiss the above-entitled action;

And further from—

(b) The judgment entered by the above-entitled Court in the above-entitled action on the 8th day of May, 1947.

Dated: August 2nd, 1947."

From the above we respectfully submit that the question presently at issue, namely the effect of the absence of a verdict, is properly before this Court. Counsel's suggestion that appellant waived this error on the part of the Court is entirely refuted in our Opening Brief. See bottom of page 29 and top of page 30, wherein authorities are cited to the effect that the method adopted by the lower Court was error.

And particularly see—

Fratta v. Grace Line, 139 F. (2d) 743 (2nd Cir.)

where, on page 744, the court stated:

"We take this occasion to suggest to trial judges that, generally speaking—although there may be exceptions—it is desirable not to direct a verdict at the close of the evidence, but to reserve decision on any motion therefor and allow the jury to bring in a verdict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight of the evidence and grant the motion, Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c, with the consequence that if, on appeal, we disagree with him, we will be in a position to reinstate the verdict, thus avoiding the waste and expense of another trial."

To the same general effect see—

Butte Copper & Zinc Co. v. Amerman, 157 F. (2d) 457, (9th Cir.)

In 64 *C.J.*, page 1053, it is said:

> "In the absence of a statute to the contrary, *a verdict is a decision by a jury, and a finding by a judge is not a verdict,* but can only be expressed by an order or judgment." (underscoring ours).

Likewise, in 53 *Am. Jur.*, page 695, Sec. 1005, it is said:

> "A verdict is the final decision of a jury concerning matters of fact submitted to it by the court for determination. Indeed, in a strict sense *only a jury can render a verdict,* and the term does not include findings by a court." (underscoring ours).

In *McCullough v. Allen,* 10 Kan. 120 (1872), it is said:

> "The word verdict, as it is used in the law, is not applicable to the findings of fact by the court."

Likewise, in *McHinler v. Warren,* 218 Mass. 310, 105 N.E. 990, where it was held that a verdict can be rendered only by a jury. This case was cited with approval in—

Fisher v. Drew, 141 N.E. 875.

On page 20 of their Memorandum counsel refer to Rule 50(b) to substantiate the action of the Court. An examination of such rule shows that it only has application *when the motion for a directed verdict is denied.* Here, the motion was granted. So, all of the words, words, and words presented by counsel on this point remain nothing but words. The authorities cited by counsel were either of stipulated judgment or error in denying the motion for a directed verdict or situations existing prior to the adoption of the present rules. Rule 46 is quoted but even under the exception within which counsel attempt to bring this

case no exception was necessary to the order of the Court granting counsel's motion.

Re: C. page 27 of counsel's Memorandum: In view of the fact that there were two motions—that is, one for summary judgment and one for dismissal, and the further fact that the motion for summary judgment was *denied,* the contention made in such subdivision C is untenable, for each motion stood on its own and was ruled on separately. That for summary judgment was denied. The failure to secure a verdict cannot now be used to reverse such order denying the motion for summary judgment; that is exactly what counsel now claim (p. 18 Memo). To permit such interpretation would be the making of a new judgment. The judgment recites the return of a verdict (which was an erroneous statement), the denial of the motion for a new trial and the granting of the motion to dismiss. No reference is made to the ruling on the motion for summary judgment and no appeal from that order was taken by appellees.

Furthermore, none of the evidence adduced by appellees was applicable to the cause of action charged upon, namely, the 1929 conspiracy; notwithstanding the Court absolutely ignored the real cause of action charged upon and allowed counsel to persuade it to wander off into a consideration of the evidence surrounding the *overt acts* set forth in the complaint. A dismissal based on such evidence was pure error.

We respectfully submit that the Court erred in taking the case from the Jury and not permitting it to render a verdict.

We also respectfully submit that appellant should have the relief prayed for in its Opening and Reply Brief filed herein.

August 18, 1948.

Respectfully submitted,

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